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PROXIMATE SOURCES OF THE CONSTITUTION

By Professor CLARENCE MANION

The prominent place which our Federal Constitution occupies, in the estimation of Americans, is indeed well merited. Few documents of a similar nature have drawn such favorable comment from authorities on the subject or have served so well the purpose of their preparation and establishment. A hundred and forty years have passed since its adoption, yet it continues to be the guiding force in our national affairs despite the fact that a prominent member of the Philadelphia Convention scoffed at the possibility of its lasting a Century. That there was an imperative necessity for such a document and that, coming when it did, it served as the life-line of our national existence, is a matter of historical fact; but that the elaborate scheme of our Constitution was hatched during the brief period intervening between the fourteenth of May and September seventeenth, 1787 is a popular misconception. The average American who thinks of our Federal Document only in terms of the Philadelphia Convention may not have fully appreciated the fact that before the surrender of Cornwallis at Yorktown, every American State had already achieved its constitutional independence and had established its own organic law, by which it should not only remain free from the foreign dominion of Great Britain, but should also remain an indestructible unit in The American Federal System. He must remember that the "Articles of Confederation and Perpetual Union" which leagued the alleged sovereign and independent States, were in force at the time of the convention and that many of the men delegated to attend that convention understood that these Articles were to be amended, not superseded. The instructions that they had received limited their authority to the

revision of the Articles of Confederation and the proposing to Congress and the State legislatures, such improvements as were required therein. It will be my purpose in what follows to show how largely the Constitution was an emanation of the existing State Constitutions as also of the Articles of Confederation.

To treat each clause or even each section individually would be well nigh impossible within the limited confines of this paper, but a pointed generalization will, I trust, throw sufficient light upon the subject.

The real American constitution-making epoch was begun at a period antecedent to 1787; namely, 1776. It seems singular therefore that the Articles of Confederation failed so completely in their purpose. That those persons, comparatively so well versed in the art of constitution-making, should have drafted so inadequate a frame of government is apparently hard to understand. The matter is, however, easily explained. At that time the idea of State sovereignty was paramount and, while each State realized that co-operation was needed, they were nevertheless ready to surrender little or nothing in order to make that co-operation perpetual. As long as Great Britain remained a common enemy, no one doubted that to launch forth as individual nations was to throttle the cause for which they were struggling. Remembering this we can partly understand why the Articles of Confederation served a greater purpose in war than in peace. Their failure was not due to inexperience on the part of the American people but it shows that forces other than ignorance were brought to bear in its construction. The people of New Jersey were unwilling to trust the people of New York, and so on.

Facilities for travel were unknown, and consequently few persons ever journeyed beyond their own State limits. These facts prompted a certain short-sightedness on the part of the people generally. Notwithstanding this the majority of those who made their way to Philadelphia in May, 1787, came with a fixed purpose.

They recognized the failure of their previous undertaking; they saw the necessity of forming a more perfect union; and,

in the midst of the sturdiest of opposition, they did so. "When therefore the convention assembled, virtually the only experience on which the members could draw in prosecuting the work before them was that of the State conventions of the last dozen years. And in these conventions at least a third, very likely half, of the members of the Philadelphia Convention had taken part.

It would be strange if we did not find many traces of the discussions and results of these conventions. And in fact these do appear again and again. The Virginia Plan, read by Governor Randolph, slight sketch as it is, shows the influence of the constitution of his State. The very name of the Senate is derived from that constitution. Evidences of such influence naturally enough appear with especial frequency in the details of the provisions adopted or suggested. The Pennsylvania opposition to a bicameral legislature is such an evidence. Hamilton's (supposed) design of having the Senate elected by freeholders only was borrowed from the constitution of his own State. Gorham's suggestion that the appointment of the judges by the President be subject to confirmation by the Senate was based on arguments from the Constitutional History of Massachusetts."¹

In referring to the American Constitution, Gladstone, the eminent English legislator, has said that "as the British Constitution is the most subtle organism which has proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man"

At the first reading this might be taken as a highly complimentary statement. Just whether it is or not is questionable. Perhaps the author of the statement measured the Constitution along side the Articles of Confederation and, seeing in their failure nothing indicative of the wonderful work that was to follow, concluded that the instrument, framed at Philadelphia in 1787, must have been, as he states, "struck off as a given time." We have seen that the Articles taken collectively were not an ex-

¹ An Introduction to the Study of the Constitutional and Political History of the States, J. F. Jameson.

ponent of the constitutional knowledge of the people of that time, and we have seen furthermore why such was not the case. We must therefore look elsewhere for a display of this alleged constitutional knowledge.

Years of experimentation had made the Colonists somewhat familiar with the drafting of Constitutions. They changed their institutions with the change of conditions. To overlook a past experience was to fail. The real sources of the Federal Constitution therefore "are to be found in the Colonial period of about two hundred years which precede the framing of the Constitution in 1787. Literally speaking the time began with Sir Walter Raleigh's charter of 1584, which makes a period of two hundred and three years."²

At or about the year 1700, development practically ceased. It had reached a stage sufficiently high for the needs of the times and, from 1700 to the outbreak of the Revolutionary War, progression rested. Development thus far, (1700) had been for the most part purely natural, and it was not until the year 1776, when all colonies except Rhode Island and Connecticut set actively to work to make new constitutions for themselves, entirely free from any influence from the Crown, that there was developed any intensity of thought upon the subject. In that year there was certainly a great school of constitution-making work, and the comparison of ideas and conflict of opinion were a lesson and discipline in fundamental principles such as have never been known in any one year before or since. The influence of this "school" is reflected throughout the Federal document. The first instruments were comparatively crude, and some States made many constitutions before satisfaction was obtained. The main ideas had been developed, however, and while there was a divergence of opinion in different localities regarding different provisions, yet when we read these documents we can readily see therein the seeds of what afterward became our Federal Constitution. In this connection it will be well to remember that at the time of the Declaration of Independence there were three kinds of government in the Colonies. Connecticut and Rhode Island had always been true republics, with governors

² The Evolution of the Constitution of the United States, Sydney G. Fisher.

and legislative assemblies elected by the people. Pennsylvania, Delaware, and Maryland presented the appearance of limited hereditary monarchies. Their assemblies were chosen by the people, but the lords proprietary appointed their governors, or in some instances acted as governors themselves. In Maryland the office of Lord Proprietary was hereditary in the Calvert family; in Delaware and Pennsylvania which, though distinct commonwealths with separate legislatures, had the same executive head, which was in the Penn family. The other eight colonies were vice-royalties with governors appointed by the king, while in all alike the people elected the legislature."³

Thus when independence was declared no great change was necessary in the case of Rhode Island and Connecticut save the omission of the king's name from all public documents. This accounts for the fact that neither of these states joined in the constitution movement of 1776. The motivating cause of the first State constitutions was the conflict between the colonies and the English king and the vexatious attitude of hostility assumed by the royal governors. The need of forming some kind of independent governments was apparent when hostilities began. Even before the Declaration of Independence was adopted by the Continental Congress, such independent governments were assumed by several States. Of these State constitutions New Hampshire's was the first to appear, coming forth January 5, 1776. Having no document of similar nature as a pattern, it was of necessity a comparatively crude instrument. Judging by it the progress made since the year 1700 had been slight indeed. Its incompleteness is not altogether surprising under the circumstances, and notwithstanding these, some of its provisions found place in the various State constitutions which followed, finally appearing in our Federal document. The gist of that provision of our Federal constitution which states that "all bills for raising revenue shall originate in the House of Representatives"⁴ appeared for the first time in any American document in this constitution of New Hampshire. The provision states that "all bills, resolves or votes for raising, levying and collecting money originate in the House of Representatives."⁵ Nearly all

³ The Critical Period of American History, John Fiske.

⁴ U. S. Constitution, Art. I, Sec. 7.

⁵ New Hampshire Constitution, 1776.

the States followed New Hampshire's lead and incorporated a similar provision in their constitutions. Again it is stipulated that "at any one session of the council or assembly neither branch shall adjourn for any longer time than from Saturday to Monday without the consent of the other branch."⁶ In one form or another this provision appeared in the Constitution of the United States that "neither House during the session of Congress, shall, without the consent of the other, adjourn for more than three days."⁷ Excepting these two provisions there is nothing in this constitution that afterward became incorporated in our Federal document. This Constitution of New Hampshire as well as the rejected Constitution of 1778 which followed is particularly conspicuous because it does not embody a provision for a governor. An explanation of the distrust of the chief executive may be found in the despotic attitude which was assumed at times by the royal governors under the charters.

"Governors were unpopular in those days. There was too much flavor of royalty or high prerogative about them. Except in the two republics of Rhode Island and Connecticut, American political history during the eighteenth century was chiefly the record of interminable squabbles between the governors and legislatures, down to the moment when the detested agents of royalty were clapped into jail, or took refuge behind the bulwarks of a British seventy-four."⁸ We can see in a measure, then, why the framers of the New Hampshire documents were loath to invest anyone with the supreme power. Incidents of their despotism were fresh in memory and they meant to avoid a repetition of such evils if it were possible. Other States, we shall presently see, took the same stand in the beginning. The idea of a double branch of legislature had been steadily gaining ground all through the colonial period, and we find a provision for it incorporated in this the first state constitution. We see a stipulation too, to the effect that the members of the upper house shall be representatives of the counties, wherein we can detect the germ of our State representatives in the Senate.

South Carolina's constitution followed shortly after that of

⁶ Ibid.

⁷ U. S. Constitution, Art. I. Sec. 5.

⁸ The Critical Period of American History, John Fiske.

New Hampshire and as the latter document was its only guide we find it, in many instances, closely followed. South Carolina provided for a governor, however to be called for the first time in the constitutions of 1776, the president. There is also to be a vice-president and a council composed of three members of the lower house and three members of the upper house. Both the New Hampshire and the South Carolina constitutions provided for the election by the people of the general assembly or lower house, after October 21, 1776. The constitutional convention was to be formed into the first general assembly and it was to choose the upper house. The provisions governing the house of the assembly were identical with those of New Hampshire; but as regards the president, vice-president, and council the earlier constitution mentioned none. The duties of the presidents, or privy councils bore a strong resemblance to those of the cabinet of the president of the United States. Undoubtedly it was suggested by the council of the English king. It was supposed to assist the president and to advise him when necessary. Other States which employed this idea in their constitutions added a provision whereby this council was required to keep an open record of its proceedings, which record was to be open for public inspection at all times. This latter idea was dropped after a few years when it was found to be impractical. The governor's privy council is one of the few instances that can be found of a direct imitation of foreign form; and it is to be observed that it is an imitation that failed. It was tried for a few years in several of the States and was then abandoned. This same fate befell other imitations of foreign institutions. Plagarisms in constitution making are in most instances unsuccessful.

In the president of South Carolina we see a striking resemblance to the president of the United States. The veto power, the absolute, marks a singular advancement. It shows that the people of those times, no matter how deeply imbued with the spirit of democracy, were unwilling to risk hasty and unbridled legislation. The president is empowered also to call together the legislature, which is now a prerogative of our chief executive of the United States.

Just a few months after the completion of South Carolina's constitution, that of Virginia was finished. To this constitution is prefixed an unusually complete bill of rights. This bill bears a more direct resemblance to the first ten amendments of our national constitution than can be found by inspecting any other sources of that document. Its completeness appears surprising at that early date but the people of that day were deeply rooted in their convictions concerning the rights of man and corresponding limitations upon the governmental power. In making this sentiment a part of its first constitution the Virginia delegates were undoubtedly influenced by Thomas Jefferson, the immortal author of the Declaration of Independence. The history of the Bill of Rights is more tangible perhaps than any other section of our constitution and as a key to the prevailing political philosophy of those times, the declarations which were embodied in the constitutions of 1776, and which were intended to safeguard the liberties of the people, should be carefully investigated by students of Constitutional History. One finds in them the ideas that were prevailing in the Colonial mind; the eagerness to provide for the liberty of the subject, the dislike of the military, the odium of general warrants of search and arrest. Here too we find light thrown upon the American progress toward religious equality, toward new relations between Church and State. The Virginia Bill begins with the language of the Declaration of Independence believing, as it says, that "all power is vested in, and consequently derived from, the people"¹⁰ A wise political maxim is contained in the provision which separates the legislative and executive powers of the State from the judiciary. One provision of this bill is copied verbatim in Article eight of our national constitution except that the words "shall not" are substituted for "ought not to." It reads: "Excessive bail ought not to be required nor excessive fines imposed nor cruel and unusual punishments inflicted."¹¹ Again "That a well regulated militia composed of the body of people trained to arms, is the proper, natural, and safe defence of a free state." The framers of the National Constitution evidently agreed with this expression, for our Federal constitution reads: "A well regulated Mili-

¹⁰ Virginia Const. 1776.

¹¹ Ibid.

tia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."¹² The principle of religious liberty also enters into the Virginia bill bespeaking the Jefferson influence. This constitution refers to its upper house as the senate whose members are to represent the respective districts of the State of Virginia. A rotary provision is found similar to that of the United States senate whereby one fourth of the membership shall be renewed at the end of each year. In much the same words as are contained in our national Constitution is the rule concerning the choosing of the speaker and other officers of the two houses; "each house shall choose its own speaker, appoint its own officers, settle its own rules of proceeding, and direct writs of election, for the applying of intermediate vacancies."¹³ The first part of this provision is practically the same as that of our national Constitution, but because of the political relation of our individual States to the United States, the clause which immediately follows this provision is not embodied in our Federal document. The power of impeachment is to reside in the lower house; such impeachment to be tried, not by the senate but by the court of appeals. In the Virginia Constitution we can easily detect the democratic tendency which caused that State nearly a century later to pass an ordinance of secession. In its bill of rights we find the following declaration: "That when any government shall be found inadequate or contrary to these purposes a majority of the community hath an indubitable right, inalienable and indereasible, to reform, alter or abolish it in such manner as shall be judged most condusive to public weal."¹⁴ This is a well defined echo of the American Declaration of Independence, and further emphasis upon the "rights of man" idea.

The New Jersey Constitution, though it came forth at a slightly later date, (July 3, 1776) was made almost contemporaneously with the Virginia Constitution and resembles it closely. We find a bicameral legislature, namely an assembly and legislative council, both of which can originate any but money bills, whose origin is confined to the general assembly. We see here, for the first time, residence in the district from which a repre-

¹² U. S. Constitution, Second Amendment.

¹³ Virginia Constitution, 1776.

sentative may come, specified as a qualification for the retention of office, which provision is now a part of our Federal Constitution. The pardoning power is given to the governor and council. This council shows some retrogression, as it is composed of three members of the legislature and is a partial restoration of the old colonial idea of combined legislature and governor's council. A negative power of amendment is implied in so far as there is a specified provision against the repealing of the clauses providing for trial by jury, religious freedom, etc. An advanced method of impeachment is provided, whereby the lower house is to bring the impeachment and the upper house to try it. There is nothing to discourage the confusion of legislative, executive and judicial departments; wherein this constitution differs from that of Virginia, where references in regard to this issue were clear cut.

Deleware's constitution was put in force September 24, 1776. It added some developments, but was, on the whole, closely modeled after those which proceeded it. We again find the double branch of legislature and money bills originating in the lower house, which is called the house of assembly. The appointing power is confided to the president, the general assembly and the privy council. The general assembly is privileged to appoint the army and navy officers, while the presidents collaborates with the privy council and the general assembly in appointing the attorney-general and the justices of the supreme courts respectively. This confusion of the appointing power is evinced in many, in fact all, of the early state constitutions. The people were loathe to give this prerogative to the chief executive, to whom it rightly belonged, for the same reason that caused New Hampshire to disregard the chief executive altogether.

The president may "by and with the advice of the privy council, lay embargoes, or prohibit the exporation of any comimodity for any time exceeding thirty days in the recess of the general assembly."¹⁴ This was the initial appearance of such a provision and we find it often repeated in later constitutions. We see a new methd of amendment calling for the ratification

¹⁴ Virginia Constitution, 1776.

¹⁵ Constitution of Delaware, 1776.

of five parts of the lower house and seven of the nine members of the legislative council. This was the first stipulation of the kind appearing in the early State constitutions. Each house is empowered to choose its own speaker, appoint its own officers, judge the qualifications and elections and settle its own rules of procedure. "They may also severally expel any of their own members for misbehavior, but not a second time in the same sessions for the same offense."¹⁶ This is the first instance in the State constitutions where power is given to expel a member as is seen in our national constitution. The provisions for adjournments, too, show a nearer approach to those embodied in our national constitution, than any we have heretofore seen. The president is empowered with the advice and consent of the privy council to call together the militia and act as commander-in-chief of them. He has also a restricted pardoning power. Nearly all the constitutions of 1776 refer to the chief executive as commander-in-chief of the state forces, and in our national constitution the president retains this title in part, being called the commander-in-chief of the army and navy of the United States.

On September 28, just a few days after the completion of the Delaware constitution, that of Pennsylvania was finished. It began with an extensive bill of political and civil rights referring principally to the Declaration of Independence. There is a provision in this bill against unwarranted searches and seizures, which requires property to be described before such an authorized search can take place. In Article four of the amendments to our national Constitution we find the following: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."¹⁷

Pennsylvania clings to the unicameral system of legislature despite the fact that the idea had been almost universally aban-

¹⁶ Constitution of Delaware, 1776.

¹⁷ Federal Constitution, Article Four. (Amendments).

doned at that time. Benjamin Franklin, president of the Pennsylvania constitutional convention, had a particular fondness for the single house system and may have been responsible for the measure. The domineering element in Pennsylvania at the time, however, was decidedly unprogressive and such a provision, or the adoption thereof, may have been due to their preponderance of power. But the evils of the unicarmal system were not long in coming to light and, in an effort to remedy them, it was later required that every bill should pass two sessions of the assembly before becoming a law. The president's council was called the Supreme Executive Council. It consisted of twelve members elected by the people and it was to collaborate with the president in the appointment of public officers and in the proposal of business to the assembly. Together with the president they were also to pardon offences, lay embargoes, and take care as to the careful execution of the laws. The justices of the Supreme Court, the president and council, assembled together, were to hear impeachments brought by the assembly. As was the case in New Jersey, the Pennsylvania document confused the executive and judicial departments, and great dissatisfaction was the result. A board of censors, whose duty was to guard against the violations of the constitutions and to see that all departments of the government did their duty properly, was the most curious institution of this constitution. This was on the whole a very queer attempt to prevent unconstitutional legislation and entirely without precedent. The constitution in its entirety, however, showed very little advance and it was put to a working test only with great difficulty.

Perhaps the most complete bill of rights yet noted in the enumerated state constitutions appeared in that of Maryland, which was completed November 11, 1776, just a month after that of Pennsylvania. It recommended the separation of the different departments, concerning which there was so much confusion at the time, and then followed with provisions concerning the trial by jury, freedom of speech and of the press, and many other guarantees all of which are at present part and parcel of our national Constitution. The main difficulty which was experienced in securing the adoption of the Constitution by the various States was that there was no bill of rights contained therein. The

people distrusted this new, quasi experimental form of government, and they wanted some assurances that it was not to become tyrannical. Many consequently pledged themselves to its support with the understanding that a bill of rights was to be added immediately. The renowned Thomas Jefferson took a similar stand. Considerable pressure must have been exercised in this direction for the first Congress under the Constitution lost no time in proposing the first ten amendments which are now familiarly known as the Bill of Rights. In the constitution of Maryland we find the substance of practically all of these amendments. Certainly no bill of any Senate constitution bears so close a resemblance to them. Many provisions are copied word for word. In Maryland's constitution, for instance, we find: "That no soldier ought to be quartered in any house, in time of peace, without the consent of the owner; and in time of war, in such manner only, as the legislature shall direct."¹⁸ In amendment Three of our national Constitution we find the following: "No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor, in time of war, but in a manner to be prescribed by law."¹⁹ As regards the article concerning searches and seizures in our constitution, the same idea is expressed very clearly in this constitution of Maryland. The provision relative to excessive bail appeared primarily, as we have seen, in the constitution of Virginia, and Maryland copied in verbatim. This provision with the mere alteration of two words is identical in our national constitution. Then again, there appears in the Maryland constitution: "That well regulated militia is the proper and natural defence of a free government;"²⁰ while the second amendment of our national Constitution says: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."²¹

In this same bill of rights of the Maryland constitution, we find provisions against retrospective and against *ex post facto*, laws spoken of in our Federal constitution. There is also the prohibition of the attainder of treason, titles of nobility and the

¹⁸ Maryland Constitution, 1776.

¹⁹ Article Three, U. S. Const. (Amendments).

²⁰ Maryland Const. 1776.

²¹ Article Two, (Amendments U. S. Const.

receiving of presents by an official of the State, from any foreign prince. These are all limitations which afterward appeared in our national Constitution. In the constitution proper of Maryland, we find a bicameral legislature provided for, where the upper house, or Senate, is chosen by electors from the various counties; much after the same manner as was afterward adopted in our national Constitution for the choosing of a president. The early State constitutions were almost universal in their condemnation of a standing army. They would have, in peace times, reduced such a force to the minimum and have kept it under the most rigid control. Maryland's constitution contains the prevailing idea. This constitution undoubtedly had a great bearing on our national document. It was unusually complete and every principle of this Maryland bill was incorporated, either in letter or spirit, in one part or another of our Federal Constitution.

North Carolina's constitution which appeared December 18, 1776, reiterates Maryland's prohibition of retrospective and *ex post facto* laws. Many of the provisions of its bill of rights are copied from those of Maryland, which we have just observed, and certainly they could hardly have hoped to improve on them. This constitution is noticeably backward, however, in so far as it provides no method of amendment. One striking advancement is seen in the following provision: "all bills shall be read three times in each House, before they pass into laws, and be signed by the Speakers of both Houses."²² This was practically the only development of this constitution, but it was one that was afterward almost universally adopted.

The Georgia constitution of February 5, 1777, was a positive retrogression. It adopts what at the time was a thoroughly antiquated system of governor and governor's council and its legislative system, like that of Pennsylvania, was unicameral. The pardoning power is given to the legislature instead of the governor. This instrument goes backward instead of forward and is obviously inferior throughout.

On April 20, 1777, New York adopted a constitution which

²² South Carolina Const. 1776.

had been in the making for nearly a year. The convention had repeatedly adjourned from place to place, and great difficulty was experienced in getting the instrument before the people. Two striking developments appear. The modified veto power is given to a revisory council composed of the president and the judges of the Supreme Court. The description of this power in the New York constitution is almost the same as that section of our national Constitution which explains the veto power of the President. The New York document states: "that all bills which have passed the Senate and Assembly shall, before they become laws, be presented to the said council for their revisal and consideration; and if upon such revision and consideration it should appear improper to the said council, or a majority of them, that the said bill should become a law in this State, that they return the same, together with their objections thereto in writing, to the Senate or House of Assembly (in whichever the same bill shall have originated), who shall enter the objections sent down by the council at large in their minutes, and proceed to reconsider the said bill. But if, after such reconsideration, two-thirds of the said Senate or House of Assembly shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and, if approved by two-thirds of the members present, shall be a law. And in order to prevent any unnecessary delays, be it further ordained that if any bill shall not be returned by the council within ten days after it shall have been presented, the same shall be a law, unless the legislature shall, by their adjournment, render a return of the said bill impracticable; in which case the bill shall be returned on the first day of the meeting of the legislature after the expiration of the said ten days."²³ The national Constitution says that in the event the president disapproves of any bill, "he shall return it, with his objection, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other

²³ Article Three, New York Const. 1777.

house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law."²⁴ Here we have the same purpose in slightly different language. Indeed the New York provision is the more complete of the two in so far as it does not permit the "pocket veto," which has been used under our Constitution. The earlier constitution, it will be noticed, calls for a return of the bill upon the reconvening of the legislature; our national document allows the measure to rest upon adjournment of the legislature. The above quotations will serve to show how the national constitution improved the language of the documents from which it took its provisions; hence we rarely see language verbatim from the early state constitutions or from any other pre-existing document. There is another provision of the New York constitution which is interesting in its connection with that of the United States. "That it should be the duty of the Governor to inform the legislature, at every session, of the condition of the State, so far as may respect his department; to recommend such matters to their consideration as shall appear to him to concern its good government, welfare, and prosperity."²⁵ In speaking of the duties of our chief executive our national Constitution has this to say: "He shall from time to time give to the congress information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient;"²⁶ These are the only remarkable similarities, other than those which we have noticed in other constitutions, that are seen in the New York document. The provision concerning the modified veto power is very important however, as it is the fruit of working conditions in America and not a direct copy of the absolute power of the English King.

An almost verbatim copy of the Pennsylvania constitution was made in Vermont and adopted July 8, 1777; it employs the idea of governor and council and has legislature of a single

²⁴ U. S. Const. Article One. Section 7.

²⁵ New York Const. 1777.

²⁶ U. S. Const. Article Two, Section Three.

branch. It employs Pennsylvania's extraordinary board of censors and was very backward in every way. Some of the best ideas of the times were embodied in the constitution of Massachusetts which people rejected at this time. The very fact of its submission to the people directly, was a novelty. The two legislative bodies were called the Senate and House of Representatives, as they are now called in the federal constitution. The Governor could grant reprieves, and was to be commander-in-chief of the militia. Together with the lieutenant-governor and speaker of the house he was given a share of the pardoning power. It employed the New York idea of president's message, gave the Senate power to try impeachments, the prosecution to be carried on by the house, and in short was very complete in its embodiment of up-to-date provisions. On the other hand this constitution contained no new, or radical, ideas and just why the people of Massachusetts rejected it is puzzling. The precedent established whereby this constitution was submitted to the direct vote of the people has been almost universally followed by our various states.

A real summary of all that was of value in constitutions at that time appeared in the second constitution of South Carolina. It went into effect in November, 1778. We find the appointing power vested in the President and a provision, "that neither the Senate nor House of Representatives shall have power to adjourn themselves for any longer than three days, without mutual consent of both."²⁷ This latter provision is copied, not verbatim it is true, but the subject matter, even the time limit, is exactly the same.

Massachusetts, finally persuaded her people to accept a very verbose and self explanatory constitution in the year 1780. Here the veto power is given to the governor and there is found a provision which reads: "and in order to prevent unnecessary delays; if any bill or resolve shall not be returned by the governor within five days after it shall have been presented, the same shall become a law."²⁸

It further provides that a bill shall not become a law in case

²⁷ South Carolina Const. 1778.

²⁸ Massachusetts Const. 1780.

the legislature shall adjourn before the stated five days shall have elapsed. This permitted the use of the "pocket veto" as does our national Constitution, and as was not the case with New York, where the idea of the whole provision originated. The governor may pardon all offences except impeachments, which is the same as with our Federal executive head, and we read: 'that no member of the House of Representatives shall be arrested or held to bail or mean process during his going unto, returning from, or his attending the General Assembly.'²⁹ In Chapter Eight we read: "The Privelege and benefit of the Writ of Habeas Corpus shall be enjoyed in this Commonwealth in the most free, easy, cheap, expeditious, and ample manner; and shall not be suspended by the legislature except upon the most urgent and pressing occasions."³⁰ Then in our national Constitution: "The Privelege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."³¹ In the latter provision it is not specifically stated to whom the power of suspending this writ belongs. The Massachusetts document expressly states this point however and, during the administration of President Lincoln, a similar interpretation was put upon our Constitution by congress as a result of the agitation of the case of John Merryman.

New Hampshire framed a new constitution, which was finished June 10, 1778 but rejected by the people. Its simplicity and brevity are noticeable, but little development is seen. Some executive powers are given to the president of the council but it does not provide further for a governor. The rejection of this constitution forced New Hampshire to be content with her original document until 1784. In this year the people accepted an instrument which was a direct copy of the Massachusetts constitution of 1780. It introduced one new idea, however, contained in the following provision: "No subject shall be liable to be tried, after acquittal, for the same crime or offence."³² Amendment Five of our national Constitution contains the same idea: ". . . nor shall any person be subject for the same offense

²⁹ Massachusetts Const. 1780.

³⁰ Ibid.

³¹ U. S. Const. Article One, Section Nine.

³² New Hampshire Const. 1784.

to be twice put in jeopardy of life or limb;"³³ The latter provision implies of course, "after acquittal," though it is likely to be confusing if we are not familiar with the provision of the New Hampshire constitution whence it came. This constitution closed the constitution-making epoch which was begun 1786 but only very slight changes were made; so few in fact that in 1776. It is true that Vermont refashioned her constitution in the document can hardly be called new. Strictly speaking, therefore, the "school" ended where it had begun; in New Hampshire, 1784.

In the foregoing exposition of the State constitutions each document has been treated in the chronological order of its appearance. The articles of Confederation and Perpetual Union, our first Federal Constitution came forth for the ratification of the States in 1777. It will be remembered here that the government under the first continental Congress which assembled in 1774, was of a purely revolutionary character. Administrative acts were carried on through the acquiescence of the States and the people, while Congress exercised certain undefined powers which were of general concern. During this period, some very high functions of sovereignty were exercised by this body. Paramount among these, of course, was the Declaration of Independence. Congress also carried on negotiations and contracted an alliance with France. It borrowed money on the credit of the nation, built a navy, and raised and organized a continental army. By acquiescence of the people it was given power to conclude peace terms and declare war. Before they drafted their formal constitutions, which we have just treated, the several States employed a somewhat similar system of government but, unlike the "States United," they lost no time in setting to work and, for the most part, had their task completed before our independence was acknowledged by Great Britain. During this period the activities of Congress were founded simply upon the general assent of the States; a poor foundation to say the least. A merely revolutionary government could not long answer the purpose of the Union. The powers of the Continental Congress having never been formally conferred, or indeed agreed upon by

³³ U. S. Const. Amendment Five.

the States, that body was regarded by the State authorities as an advisory body rather than as a government, and the pressure of external necessity determined the degree of obedience its commands or advice should receive. In most important matters they were often disregarded, and the confederation seemed at the point of falling to pieces for the want of legal power to compel the performance of duties owing to it by its several members. In an attempt to remedy the state of affairs Congress prepared the Articles of Confederation and Perpetual Union, which was submitted to the States for ratification in November, 1777. At this time much, if not all, of the development which we have traced through the various State constitutions had been brought forth, but notwithstanding this fact it seems that the Articles took advantage of very little of it. They required a two-thirds vote on all important measures, thus making it possible for any five of the States to defeat legislation. Their great duty was, it seems, to give to the new government or league, some aspect of sovereignty and yet leave to each State the unrestricted right of managing its own affairs. Much has been said and written concerning this document which, upon close examination, is found to bear striking resemblance to our national Constitution. To what then can we attribute the failure of the Articles and the success of the Constitution? The expression of the opinions of a few authorities will not be amiss. "The Confederation was given authority to make laws on some subjects, but it had no power to compel obedience; it might enter into treaties and alliances with the States and the people could disregard with impunity; it might apportion pecuniary and military obligations among the states in strict accordance with the provisions of the Articles; but the recognition of the obligations must depend upon the voluntary action of thirteen States, all more or less jealous of each other, and all likely to recognize the pressure of home debts and home burdens sooner than the obligations of the broader patriotism involved in fidelity to the Union; it might contract debts, but could not provide the means for satisfying them; in short it had no power to levy taxes, or to regulate trade and commerce, or to compel uniformity in the regulations of the States, the judgments rendered in pursuance of its limited authority were not respected by the States, it had no courts

to take notice of infractions of its authority, and it had no executive."³⁴ It seems that the Articles had power to do a great deal but no sanction for such authority is stipulated. In other words, their powers were paper powers, beyond that, nothing. "Notwithstanding the declaration of the Articles that the union of the States was to be perpetual, an examination of the powers confided to the general government would easily satisfy us that they looked principally to the existing revolutionary state of things. The principle powers respected the operations of war, and would be dormant in times of peace. In short, Congress in peace was possessed of little more than an empty pageantry of office."³⁵ We are told again that, despite their declarations to the contrary, the Articles worked toward the disruption rather than the formation of the new State; "The changes effected by the Articles of Confederation were rather of a negative than of a positive nature. They did not give the state which was just coming into being a definite form, but began the work of its dissolution. The essential prerogatives which necessarily belong to a political community in its relations with other powers, they confided by law to confederate authorities, from whom, in practice they withheld all power. On the other hand, they confided all actual power to the component parts of the whole, but did not, and could not for themselves, still less for the whole, give them the right to assume the responsibilities or enforce the rights which regulate the relations of sovereign states."³⁶

It would be unjust to the Articles, however, if we passed over them without pointing out their many resemblances to our national Constitution. In the first place Article I. gave the Union its present name; the United States of America. Provisions for inter-state comity are found in Article IV in much the same language as they appear in the Constitution. Article VI denies to the states the right to send any embassy to or receive any embassy from, as well as to confer with a foreign power without the consent of Congress; also it forbids persons holding offices of emolument or trust under the United States to receive any present, title etc., from any king or foreign prince.

³⁴ Constitutional Law. Thomas M. Cooley.

³⁵ Commentaries on the Constitution, Storey.

³⁶ Constitutional History of the United States, Von Holst.

It forbids states to maintain armies and navies, or to lay imposts or duties which may conflict with treaties formulated by Congress. That provision of the seventh article referring to the appointment of officers below the rank of colonel in troops raised by the states remains under our national Constitution. In many instances the Articles are verbose and cumbersome, taking on the nature of a code: wherein it differs from the Constitution which is much more concise and explicit. In our opinion there is no great analogy between the early state constitutions and the Articles of Confederation. The men who framed the former documents were actuated, for the most part, by motives of the loftiest patriotism to their individual states. With the Articles of Confederation we are prone to think otherwise. The framers were intent, it seems, on abridging over the difficulties of the times and, while they were desirous that the benefits of union should accrue to them yet they wanted none of its responsibilities. The people of the Colonies had just finished, or were in the process of, shaking off a power, which they believed tyrannical, and they wished to pledge themselves to no other even though it be of their own making. The Confederation was rather a league than a national government, for it possessed no central authority except an assembly in which every State, the largest and smallest alike, had one vote, and this authority had no jurisdiction over the individual citizen. The system acted upon the States as sovereigns and yet endeavored to retain a degree of sovereignty for itself. It was this quality of absolute sovereignty that doomed it to utter failure. Conflicts were practically invited and in the event that one of its subjects (the States) would dissent, war would be the result. In the State constitutions we found almost without exception, despite the extant prejudice against the old colonial governors, a provision for a chief executive. This was on one point which had been thoroughly threshed out and many of the duties attached to that office had been clearly defined. Here was an opportunity for the Articles to accept a matter of fact. The members of Congress at the time of the framing of the Articles were representatives of their respective states by whom they were paid. They shared the same distrust of a federal executive and of nationalization in general as was felt at home. Thus the Articles were wilfully inefficient. "Obe-

dience is what makes a government, not the names by which it is called." The States were not obedient to Congress under the Articles of Confederation. While the war lasted a certain unanimity of spirit prompted by the community of interest had existed but when the British sailed away from New York in 1783, a reversion of sentiment lost no time in asserting itself. The powers of Congress dwindled until the condition of that body was really pitiful. The sentiment in favor of local self-government increased by leaps and bounds and distrust of the Union increased proportionally. 'A wholesome feeling it was, and one which needed not so much to be curbed as to be guided in the right direction. It was a feeling which was shared by some of the foremost Revolutionary leaders, such as Samuel Adams and Henry Lee. But unless the most profound and delicate statesmanship should be forthcoming to take the sentiment under its guidance there was much reason to fear that the release from the common ashesion of Great Britain would end in setting up Thirteen little republics ripe for endless squabbling, like the republics of ancient Greece and medieval Italy, and ready to become the prey of England and Spain, even as Greece became the prey of Macedonia."³⁷ The provision for a perpetual union had outlived its usefulness in a few short years. It had accomplished a temporary purpose in a very imperfect manner but it was impossible that it should do more. There was one provision of the Articles, however, for which we have good reason to be thankful; it was an absolute rigid document. Practically there was no amendment possible, as it provided for the necessary concurrence of every State in that event. It was this difficulty of amendment which gave us our constitution, for while in the resolution of Congress calling for the Philadelphia convention, revision of the Articles is mentioned, yet when these gentlemen arrived they wisely substituted a new constitution which was to be much easier of adoption and, as we have seen, infinitely more far-reaching in its results.

It has been noticed that the rule generally with the State constitutions of 1776 was to absorb what practical development was evinced in its predecessors and in turn to add some provisions of its own. In its turn the Federal Constitution can

³⁷ Critical Period of American History, John Fiske.

not be said to have deviated a great deal from this general rule. In its work of absorbing and assembling provisions of worth it is more comprehensive than any of its predecessors, but as to the development of new provisions it can not be well said to have furnished its full quota. Much of that which is extemporaneous in our constitution appears in the Schedule, Articles (IV to VIII); new provisions in other places were suggested by circumstances or immediate necessity. They are very simple for the most part and are the only portions of the constitution to which the appellation "struck off at a given time" can be correctly applied. "All debts contracted and engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation."³⁸ Congress shall have power; "To exercise Legislation in all Cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States,"³⁹ "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; and on the Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."⁴⁰ "The ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."⁴¹ "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."⁴² The President "may require the Opinion in writing, of the principal Officer in each of the executive Departments upon any subject relating to the duties of their respective offices, . . ."⁴³ "To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;"⁴⁴ "No Senator or Representative shall during the Time

³⁸ U. S. Const. Article Six.

³⁹ U. S. Const. Article One, Section Eight.

⁴⁰ U. S. Const. Article Four, Section Four.

⁴¹ U. S. Const. Article Seven.

⁴² U. S. Const. Article One, Section Four.

⁴³ U. S. Const. Article Two, Section Two.

⁴⁴ U. S. Const. Article One, Section Eight.

for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time;⁴⁵ "The Migration or Importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."⁴⁶

"New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State: nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."⁴⁷ "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."⁴⁸ "No preference shall be given by any Regulation of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another."⁴⁹ "No State Commerce or Revenue to the Ports of one State over those of shall, without the Consent of the Congress, lay any Imports or Exports, except what may be absolutely necessary for executing its inspection Laws."⁵⁰

Among the Amendments, those, namely, the Ninth and Tenth, which speak of the States in their relation to the Union are consequently new. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁵¹

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people."⁵²

⁴⁵ U. S. Const. Article One, Section Six.

⁴⁶ U. S. Const. Article One, Section Nine.

⁴⁷ U. S. Const. Section Three, Article Four.

⁴⁸ *Ibid.*

⁴⁹ U. S. Constitution, Section Nine, Article One.

⁵⁰ U. S. Constitution, Section Ten, Article One.

⁵¹ U. S. Constitution, Amendment Nine.

⁵² U. S. Constitution, Amendment Ten.

CONCLUSION

With the exception of the above quoted provisions very little of the Federal Constitution was "struck off at a given time" by the delegates to the Philadelphia Convention of 1787. The major work of that Convention was one of codification; collective rather than constructive. The delicate balance of power between the State and the Federal Government was its principal if not its sole contribution to American Constitutional History.